Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SALVADOR A. GODINEZ,

Petitioner,

v.

JEROME WHITE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the United States Court of Appeals for the Seventh Circuit conflicts with decisions of this Court, including *Coleman v. Thompson*, 501 U.S. 736 (1991), *Harris v. Reed*, 489 U.S. 255 (1989), and *Teague v. Lane*, 489 U.S. 288 (1989).

2. Whether the decision of United States Court of Appeals for the Seventh Circuit is contrary to the approach taken by a majority of the Circuit Courts.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment and opinion entered on April 28, 1998.

OPINION BELOW

The April 28, 1998, decision of the United States Court of Appeals for the Seventh Circuit is published at 143 F.3d 1049 (7th Cir. 1998). This decision is reprinted in the appendix to this petition. The June 22, 1998 order of the Seventh Circuit, denying Godinez's Petition for Rehearing with Suggestions for Rehearing *en banc*, is reported at 1998 U.S. App. LEXIS 13687 (7th Cir. June 22, 1998), and is reprinted in the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on April 28, 1998, and rehearing was denied on June 22, 1998. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The United States District Court for the Central District of Illinois, Urbana Division asserted jurisdiction under 28 U.S.C. § 2254. The United States Court of Appeals for the Seventh Circuit's jurisdiction was founded upon 28 U.S.C. §§ 1291 and 2253.

Respondent, Jerome White, had appealed from a final judgment of the district court denying his petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. On February 15, 1983, White had been convicted in Champaign County, Illinois, for murder and conspiracy to commit murder, and was sentenced to natural life imprisonment in the Illinois Department of Corrections. White's conviction and sentence were affirmed on direct appeal to the Appellate Court of Illinois, Fourth Judicial District. *People v. White*, 122 Ill.App.3d 24, 460 N.E.2d 802 (4th Dist. 1984). White did not seek leave to appeal to the Illinois Supreme Court.

White thereafter filed a *pro se* petition for post-conviction relief. On February 10, 1987, after the circuit court dismissed the petition, the appellate court reversed the dismissal and remanded the case with directions to appoint counsel to represent White. *People v. White*, 152 Ill.App.3d 404, 504 N.E.2d 520 (4th Dist. 1987). White's attorney filed a supplemental post-conviction petition adopting and incorporating the *pro se* petition. The circuit court dismissed the petition. On March 31, 1989, the appellate court affirmed the dismissal on appeal. *People v. White*, 180 Ill.App.3d 781, 536 N.E.2d 481 (4th Dist. 1989). In September, 1989, the Supreme Court of Illinois denied White's petition

for leave to appeal. *People v. White*, 545 N.E.2d 128 (1989).

In early 1994, White filed a petition for writ of habeas in the United States District Court for the Northern District of Illinois. That court transferred the petition to the Central District of Illinois, which construed the petition to raise five claims: (1) White's grand jury indictment violated due process because it was based upon perjured testimony; (2) trial counsel provided ineffective assistance by failing to challenge the grand jury perjury, failing to consult with White prior to trial, appearing at trial smelling of alcohol, failing to call one Bernice Caldwell to testify and failing to explain to White his constitutional right to testify in his own defense; (3) denial of the right to testify; (4) inadequacy of the State's fact-finding procedures and unfairness of the waiver doctrine asserted by the State; and (5) withholding of information by the State concerning the perjured grand jury testimony. White later amended the petition to include his challenge to the disproportionate severity of his life sentence compared to the forty-year sentence of Bernice Caldwell.

The district court denied White's petition on July 31, 1996, without holding an evidentiary hearing. The court held that trial counsel's alleged failure to consult and his failure to call Bernice Caldwell did not deny White his right to effective assistance of counsel, and that White's claim of perjury did not undermine the indictment. The court found that all of the other arguments raised in the petition had been procedurally defaulted because White did not include them in his petition for leave to appeal to the Illinois Supreme

Court from the denial of post-conviction relief in his case.

While the district court denied White a certificate of probable cause, the Court of Appeals granted White a certificate of appealability on March 10, 1997, with respect to the ineffective assistance of counsel claims and the district court's application of procedural default principles.

In an opinion issued on April 28, 1998, the Court of Appeals vacated the district court's denial of White's habeas corpus petition, and remanded to the district court for an evidentiary hearing as to some of White's claims, and for consideration on the merits of two other claims which the district court had found procedurally defaulted for White's failure to have raised them in his petition for leave to appeal after the appellate court's affirmance of the denial of relief on his post-conviction petition.

The court noted that, in its recent decision in *Boerckel v. O'Sullivan*, 135 F.3d 1194 (7th Cir. 1998) (*cert. pending sub nom. O'Sullivan v. Boerckel*, No. 97-2048), it had held that the failure to include a claim in a petition for discretionary review following affirmance on direct appeal did not constitute either a failure to exhaust available state remedies or a procedural default. Although, in the past, the Seventh Circuit appeared to have followed a different rule with respect to the need to raise issues on discretionary review following the affirmance of the denial of a petition for collateral relief (*Jenkins v. Gramley*, 8 F.3d 505 (7th Cir. 1993), *Cawley v. DeTella*, 71 F.3d 691 (7th Cir. 1995)), the court here found that if such a failure cannot result in procedural

default on direct appeal, such a failure at the post-conviction stage cannot result in procedural default either. *White v. Godinez*, 143 F.3d 1049, 1053 (7th Cir. 1998).

On June 11, 1998, Godinez filed a petition for rehearing with suggestion for rehearing *en banc*. The petition was denied in an order dated June 22, 1998. No judge in active service requested a vote thereon, and all of the judges on the original panel voted to deny rehearing. The United States Court of Appeals for the Seventh Circuit issued its mandate on June 30, 1998. On July 2, 1998, Godinez moved the Seventh Circuit for a recall and stay of its mandate pending resolution of the instant petition, and, following a court-ordered response by counsel for White, the court denied the motion on July 15, 1998. Thereafter, in the District Court, counsel for White sought leave to withdraw, and on September 8, 1998, counsel's motion was granted.

Petitioner seeks a writ of certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because The Seventh Circuit's Holding Conflicts With The Principle That Exhaustion Is Based On Federal Notions Of Comity Rather Than The State Court's Procedural Rules.

Already pending before this Court is a petition seeking a writ of *certiorari* with respect to the Seventh Circuit's decision in *Boerckel v. O'Sullivan*, 135 F.3d 1194 (7th Cir. 1998) (*cert. pending sub nom. O'Sullivan v. Boerckel*, No. 97-2048). In that case, the Seventh Circuit had held that the failure to include a claim in a petition for discretionary review following the affirmance of a criminal conviction on direct appeal did not constitute either a failure to exhaust available state remedies or a procedural default. Although, in the past, the Seventh Circuit appeared to have followed a different rule with respect to the need to raise issues on discretionary review following the affirmance of the denial of a petition for collateral relief (*Jenkins v. Gramley*, 8 F.3d 505 (7th Cir. 1993), *Cawley v. DeTella*, 71 F.3d 691 (7th Cir. 1995)), in the case at bar the Seventh Circuit extended its holding in *Boerckel* to appeals from collateral review as well, and, accordingly, ordered the District Court to, *inter alia*, entertain the merits of two ineffective assistance of counsel claims which the District Court had found procedurally defaulted. *White v. Godinez*, 143 F.3d 1049, 1053 (7th Cir. 1998). Respondent here makes essentially the same claims raised on the petition currently pending before this Court in *Boerckel*.

On appeal, Godinez argued that the district court correctly determined that White had procedurally defaulted the claims at issue by failing to present these claims in his petition for leave to appeal to the Illinois Supreme Court. Godinez acknowledged the Seventh Circuit's decision in *Hogan v. McBride*, 74 F.3d 144 (7th Cir.), *modified on reh'g denied*, 79 F.3d 578 (7th Cir. 1996), which suggested that this Court's decisions, including *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) and *Coleman v. Thompson*, 501 U.S. 722 (1991), had invalidated prior caselaw in the Seventh Circuit requiring a habeas petitioner to seek review in the state's highest court on pain of forfeiture. *See Nutall v. Greer*, 764 F.2d 462 (7th Cir. 1985). However, White urged the Seventh Circuit that a more careful reading of *Coleman* should require a contrary finding.

The *Coleman* Court discussed that, in the habeas context, application of the independent and adequate state law doctrine is grounded in concerns of comity and federalism. *Coleman*, 501 U.S. at 730. Moreover, the Court noted that when the independent and adequate state ground supporting a habeas petitioner's custody is a state procedural default, an additional concern comes into play, the exhaustion requirement. *Id.* at 731. Since exhaustion is also grounded in concerns of comity, this means that in a federal system, the states should have the first opportunity to address and correct alleged violations of state prisoners' federal rights. *Id.* (*citing Rose v. Lundy*, 455 U.S. 509, 518 (1982)). The Court concluded that the same concerns apply to both exhaustion and procedural default. *Coleman*, 501 U.S. 731. It reasoned:

> Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him. *See* 28 U.S.C. § 2254(b); *Engle v. Isaac*, 456 U.S. 107, 125-126, n. 28, 102 S.Ct. 1558, 1570, n. 28, 71 L.Ed.2d 783 (1982). In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interests in correcting their own mistakes is respected in all federal habeas cases.

Id. at 732.

Thus, *Coleman* recognized the subtle interplay between the concepts of exhaustion and procedural default. But more importantly, the *Coleman* Court reaffirmed the necessity of giving state courts the first opportunity to address allegations of constitutional error concerning state court convictions.

Much of the *Coleman* Court's discussion focused on the difficulty of crediting state court decisions since it is often unclear if the state law analysis was independent of federal law. The Court concluded that in ambiguous cases, federal courts may address the merits of the habeas petition if the decision of the last state court

to which the petitioner presented his claims fairly appears to have rested primarily on federal law in resolution of those claims, or to have been interwoven with federal law, and does not clearly and expressly rely on an independent and adequate state ground. *Coleman*, 501 U.S. at 735. However, the Court stated that this rule does not apply in cases where the petitioner failed to exhaust state court remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. *Id.* at 735 n.1. "In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims." *Id. citing Harris v. Reed*, 489 U.S. 255, 269-270 (1989) (O'Connor, J., concurring); *Teague v. Lane*, 489 U.S. 288, 297-298 (1989).

The exception to the rule announced in *Coleman* is precisely the situation in the instant case. Here, White failed to raise the claims at issue to the Illinois Supreme Court. The time for filing the claims had long since passed. *See* Supreme Court Of Illinois Rule 315(b). Thus, White's failure to exhaust state court remedies when he failed to include the claims in his petition for leave to appeal to the Illinois Supreme Court should have precluded the Seventh Circuit from remanding such claims to the district court for a determination on the merits, since they had been procedurally defaulted. It is precisely White's failure to exhaust, coupled with the fact that he no longer can exhaust, which ripens into a procedural default. *See Coleman*, 501 U.S. at 735 n.1.

In *Boerckel*, which the Seventh Circuit followed in this case, the Seventh Circuit attempted to "solve[ ] the puzzle of how many chances a petitioner must give the state courts to review his claims" by turning to the language of 28 U.S.C. § 2254(c). *Boerckel*, 135 F.3d at 1199. However, in concluding that an applicant has exhausted the remedies available if he takes advantage of whatever appeals the state system affords as of right (*id.* at 1200), the *Boerckel* court interpreted § 2254(c) too literally.

The *Boerckel* court's too literal interpretation seems to have been borne out of its improper reliance upon *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994) (which stressed that "'the right to raise' an issue referred to in § 2254 means more than a mere opportunity to seek leave to present an issue; it means a realistic, practical chance to present an issue and have it considered on the merits"), and a result-oriented analysis. Aside from *Dolny*, the *Boerckel* court found support for its conclusion from the fact that Illinois discourages litigants from raising every possible claim of error, which it incorrectly determined substantiated its conclusion that Illinois does not consider it necessary that petitioners raise all of their claims to exhaust their remedies. *Boerckel*, 135 F.3d at 1200. Additionally, the *Boerckel* court noted that Illinois recognizes that its Supreme Court practice is similar to this Court's *certiorari* procedure. *Id.* (*citing* Ill. S. Ct. R. 315 Comm. Cmts). Reliance upon these factors led the court to an erroneous conclusion.

The Eighth Circuit, in *Dolny v. Erickson*, relied too heavily on the limited availability of relief in the state's

supreme court. *Dolny*, 32 F.3d at 384 (stating that a prisoner's right of review in the state supreme court was "unquestionably restricted" because the state court grants less than 25% of all petitions for review, including non-habeas petitions). After reviewing the Minnesota Supreme Court's statistical record, the Eighth Circuit characterized the Minnesota Supreme Court as unwilling to grant discretionary review of habeas petitions, and then declared that petitioning that state's supreme court is always unnecessary. *Id.* Because the availability of review in state supreme courts may fluctuate (due to changes in court rules, statutes, and even state constitutions), and because federal courts disagree about the state courts' degree of availability, the Eighth Circuit's reliance on the scarcity of discretionary review does not necessarily improve judicial efficiency, because the state supreme court could grant relief in some instances, thereby reducing the federal courts' workload. *See* Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting*, 79 MINN. L. REV. 1197, 1225 (1995) (authored by Matthew L. Anderson).

The *Dolny* court's decision also undermines notions of comity because it fails to balance other interests at stake in determining whether a federal court should exercise its discretion to review a technically exhausted petition. *Id.* Although the *Dolny* court considered the state court's interest in hearing habeas petitions generally, it failed to consider the state's interests in that particular case. *Dolny*, 32 F.3d at 384 (analyzing reasons why dismissing petition for failure to exhaust would burden the state supreme court, but failing to discuss any interest the state court may have in ruling

on the merits of a prisoner's claims). The Eighth Circuit provided state prisoners a direct route to federal court that bypasses the state supreme court. *Id.* ("[W]hen a petitioner has presented his claims to the State's Court of Appeals, [he] need not . . . [seek] discretionary review prior to requesting federal habeas relief."). This direct route virtually obliterated any opportunity for the state supreme court to influence its state's habeas process or to increase protection of federal rights within the state, because it left state prisoners with little incentive to petition the state supreme court.[1] *Requiring Unwanted Habeas*, *supra*, at 1225-26. In addition, a blanket rule declaring petitions to state supreme courts unnecessary for exhaustion purposes leaves the state courts with statutory authority to exercise discretion in granting review of habeas petitions from state prisoners, but without any practical opportunity to exercise that discretion. *Id.* at 1226. Furthermore, allowing prisoners to circumvent the state supreme court immediately reduces that court's influence over the state's intermediate courts of appeal. *Id.*

Moreover, the fact that the Illinois Supreme Court may discourage litigants from raising every possible claim cannot be equated with that court's tacit approval that criminal defendants need not petition for leave to

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[1] Of course, prisoners believing the state supreme court is more likely to provide relief than federal courts have an incentive to petition for discretionary review. Conventional wisdom, however, is that federal courts are more receptive to federal constitutional issues and exercise more independent judgment. *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1022-24 (1985) (distinguishing the interests of federal and state judges).

appeal in order to exhaust their remedies. First, even on direct appeal, Illinois long has recognized the need to winnow frivolous claims of error from those which have merit. *People v. Henderson*, 215 Ill.App.3d 24, 29, 574 N.E.2d 268 (5th Dist. 1991) (*citing Jones v. Barnes*, 463 U.S. 745 (1982) (holding that appellate counsel need not raise every non-frivolous issue on appeal)). Further, the fact that the Illinois Supreme Court encourages selective presentation of issues is consistent with the fact that federal habeas corpus is itself an extraordinary remedy. The district courts in the Seventh Circuit annually receive more than a thousand petitions for writs of habeas corpus, yet they grant only 1.5 percent of them. Don R. Sampen, *Defendant fails to preserve federal claim*, *Chicago Daily Law Bulletin*, June 3, 1997 at 6, col. 2.

Finally, there is an important distinction between requiring a prisoner to file a petition for writ of *certiorari* and requiring him to file a petition for leave to appeal for purposes of exhaustion. As has already been discussed, exhaustion is rooted in concerns of federalism and comity. This means that the state courts should be given the first opportunity to examine and correct errors of federal constitutional concern which result from state court convictions. Requiring a prisoner to file for *certiorari* does not advance these interests. However, allowing the highest state court to review a state court conviction clearly does.

A "rigorously enforced total exhaustion rule" provides state courts with every possible opportunity to correct a constitutional error. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982). Strict enforcement of the exhaustion re-

quirement furthers the purposes of exhaustion, and promotes the various state, federal, and prisoner interests involved, by providing state courts with ample opportunity to correct constitutional violations and by ensuring consolidation of prisoners' multiple claims. The Seventh Circuit's holdings in *Boerckel* and in the case at bar stand in stark contrast to well-settled principles of habeas review. Accordingly, *certiorari* should be granted.

II.

Certiorari Should Be Granted Because The Seventh Circuit's Holding Conflicts With The Decisions Of A Majority Of The Circuit Courts of Appeals.

The exhaustion doctrine in federal habeas corpus should be construed to require a petitioner to seek discretionary review of the claims in the state's highest court before presenting the claims in the federal court to promote the principle of comity. As this Court held in *Rose v. Lundy*:

> Under our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution.'
>
> * * *
>
> A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error.

455 U.S. 509, 518-19 (1991) (*quoting Ex parte Royall*, 117 U.S. 241, 251 (1886)).

The majority of the circuit courts of appeals find that a federal claim is procedurally barred if a petitioner has

failed to raise a claim before the state's highest court, and the time for filing in that court has lapsed. *See McNeeley v. Arave*, 842 F.2d 230, 231 (9th Cir. 1988) (finding a petitioner failed to properly exhaust his state remedies by neglecting to present a claim to the state's highest court on direct review, regardless of whether he is entitled to review as a matter of right); *Jennison v. Goldsmith*, 940 F.2d 1308, 1310 (9th Cir. 1991) (finding a petitioner failed to properly exhaust his state remedies by neglecting to present a claim to the state's highest court on direct review, regardless of whether he is entitled to review as a matter of discretion); *Richardson v. Procunier*, 762 F.2d 429, 431-32 (5th Cir. 1985) (holding a petitioner must seek discretionary review in the Texas Court of Criminal Appeals); *Dulin v. Cook*, 957 F.2d 758, 759 (10th Cir. 1992) (holding that habeas petitioner's failure to seek discretionary review of claim in Utah Supreme Court procedurally bars him from federal habeas review); *Grey v. Hoke*, 933 F.2d 117, 119 (2nd Cir. 1991) (holding that a petitioner must present his federal constitutional claims to the highest court of the state before a federal court may consider the merits of the petition); *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993) (dismissing, with prejudice, federal habeas petition because petitioner did not exhaust his state law remedies by presenting claim to Kentucky Supreme Court and further holding that petitioner would be procedurally barred from presenting the claim to the Kentucky Supreme Court); *Townsend v. Commissioner*, No. 94-1270, 1994 U.S. App. LEXIS 9750, at *2 (1st Cir. May, 1994) (unpublished opinion holding that a habeas petitioner's failure to appeal the denial of his state habeas petition to the New Hampshire Supreme

Court constitutes a procedural default rather than a failure to exhaust state remedies); *Caswell v. Ryan*, 953 F.2d 853, 861 (3rd Cir. 1992) (holding that petitioner's failure to raise claim of ineffective assistance of counsel in *nunc pro tunc* petition to the Pennsylvania Supreme Court constituted a procedural default of the claim in federal court); *but see Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984) (for purposes of §2254, Georgia defendant who lost appeal as of right need not petition the Georgia Supreme Court for *certiorari*, given that court's limited jurisdiction); *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994) (holding that, in light of the limited jurisdiction of the Minnesota Supreme Court, a petitioner need not request discretionary review prior to requesting federal habeas relief).

A rule declaring petitions for discretionary review to state supreme courts unnecessary for exhaustion purposes would virtually obliterate any opportunity for a state's highest court to protect federally secured rights because it would leave state prisoners with little incentive to petition state supreme courts. Furthermore, allowing state prisoners to circumvent the state's supreme court immediately reduces that court's influence over the state's lower level appellate courts. *See* Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting*, 79 MINN. L. REV. 1197, 1225-26 (1995) (authored by Matthew L. Anderson).

Requiring exhaustion of state court remedies furthers state court interests by insuring that state courts retain a role in interpreting and enforcing federal law, by protecting the federal and state judicial systems from

unnecessary friction, and by promoting finality of state court judgments. *See Rose*, 455 U.S. at 518. In addition, by requiring state habeas petitioners to bring federal claims in state courts, the exhaustion requirement encourages state courts to become familiar with and knowledgeable about federal law. *Id.* at 519.

This Court also intended the exhaustion doctrine to increase judicial efficiency. *Harris*, 489 U.S. at 255, 269 (O'Connor, J., concurring); *Rose*, 455 U.S. at 519 (noting that state courts create complete factual records that facilitate federal review). By requiring exhaustion of state remedies, federal courts encourage state courts to make, develop, and document factual and legal findings involved in prisoners' petitions. *Harris*, 489 U.S. at 269 (O'Connor, J., concurring) (*citing Rose*, 455 U.S. at 518-19). In addition, requiring exhaustion fosters an orderly process for habeas appeals forcing prisoners to pursue all the remedies in one forum before pursuing remedies in another and by allowing prisoners to make only one transition between the two forums. Moreover, as prisoners work through the process, they may abandon habeas claims if state courts provide sufficient relief, or they may refine and clarify their habeas petitions through additional state court appeals, thereby reducing or eliminating the federal courts' duties. Judicial efficiency benefits state and federal courts as well as prisoners, who prefer to have their claims heard and resolved as quickly as possible. *See Rose*, 455 U.S. at 519-20.

The Seventh Circuit expressed concern in *Hogan* that defendants do not have a constitutional right to counsel on discretionary review, thus "treating an omission

from a petition for a discretionary hearing as a conclusive bar to federal review under § 2254 could create a trap for unrepresented prisoners. . ." *Hogan* 74 F.3d at 147. The Seventh Circuit's concern is unnecessary. Since a defendant on appeal to the Illinois Appellate Court is entitled to counsel as of right, any relevant claims regarding trial court error are appropriately raised on that appeal. An unrepresented prisoner on discretionary review has the benefit of being able to raise those claims previously alleged on direct appeal where he had counsel. Moreover, a prisoner may not raise a claim for the first time on discretionary review. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989).

Requiring a prisoner to apply for discretionary review from the state supreme court, the approach embraced by a majority of the federal circuit courts of appeals, insures that the states have the opportunity to participate in the development of federal and constitutional law. This majority approach also favors the federal courts' interest in judicial efficiency. These important concerns, upon which the doctrine of exhaustion is rooted, should encourage this Court to grant *certiorari* in order to align the Seventh Circuit's approach with that of a majority of the federal circuit courts of appeals.

CONCLUSION

For the aforementioned reasons, Petitioner, Salvador A. Godinez, respectfully requests that this Honorable Court grant *Certiorari*, and consolidate this cause with that in *O'Sullivan v. Boerckel*, No. 97-2048.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-3187

JEROME WHITE,

Petitioner-Appellant,

v.

SALVADOR A. GODINEZ,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Urbana Division.
No. 94 C 2055—**Harold A. Baker**, *Judge.*

ARGUED JANUARY 23, 1998—DECIDED APRIL 28, 1998

Before CUMMINGS, HARLINGTON WOOD, JR. and RIPPLE, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* This appeal from the district court's denial of a writ of habeas corpus springs ultimately from a murder that took place on August 6, 1982. On that date, Al Walker and Doyle Johnson robbed and shot Waymond Jackson and Donald Stewart at a rest area on Interstate 57 near Pesotum, Illinois. Although Stewart survived the shooting, Jackson died of his wounds, turning the crime into murder. Some two weeks later, the petitioner in this case, Jerome White, was charged with murder and conspiracy to commit murder for having hired Walker and Johnson to kill Jackson. (White was also charged with armed robbery and conspiracy to commit armed robbery, but those charges are not involved in this appeal.)

At trial, Johnson was the principal witness against White. Johnson had already pled guilty to murder and received a thirty-year prison sentence. At White's trial, Johnson testified that he and Walker had met White and his girlfriend, Bernice Caldwell, in Chicago on the day before the shooting, and that White had told him he could make some money by helping White with a conflict between Caldwell and a man in Champaign (Jackson, as it turned out). During the drive from Chicago to Champaign, White allegedly told Johnson and Walker that he wanted the man he had mentioned taken "out of the game" and offered them $1,000 each to do the job. Jackson, apparently, was a pimp with whom Caldwell and White had quarreled over control of the prostitution business at the Pesotum rest area on Interstate 57.

Johnson's testimony continued: When they arrived at Bernice Caldwell's house in Champaign, White, Caldwell, Walker, and Johnson went to a bedroom where Johnson and Walker were given two guns by White, who told them to take a rental car parked in the garage. The two then drove to the rest area and shot Jackson and Stewart. Johnson and Walker were apprehended soon after as they drove the rental car toward Chicago. At first, Johnson maintained that White's brother, Michael, rather than Jerome White himself, had hired the pair to kill Jackson. Five days prior to Jerome White's trial, however, Johnson changed his story and claimed that he had lied before in order to protect Jerome White in the hope that White would get Johnson a good lawyer.

Jerome White's trial attorney pursued a defense based on the theory that Johnson's first confession, in which he implicated Michael White rather than Jerome, was a true account of the crime. Jerome White, however, was convicted of murder and conspiracy to commit murder, and the court sentenced him to life in prison. On direct appeal, White challenged several of the trial court's evidentiary rulings, the sufficiency of the evidence against him, the selection of a "death-qualified" jury, and the imposition of

a life sentence. The Illinois Appellate Court affirmed, *People v. White*, 460 N.E.2d 802 (Ill. App. Ct. 1984), and White did not seek leave to appeal to the Illinois Supreme Court.

Next White filed a *pro se* petition for post-conviction relief. In the petition, he argued that the State had knowingly used perjured testimony before the grand jury; that trial counsel had provided ineffective assistance at trial by failing to move for a dismissal of the indictment; that trial counsel had provided ineffective assistance by failing to meet with White for more than twenty minutes prior to trial and by failing to consult with him regarding trial strategy, potential witnesses, and White's right to testify on his own behalf; and that appellate counsel had provided ineffective assistance by refusing to pursue on direct appeal the claims regarding the grand jury's indictment. The circuit court summarily dismissed the petition as frivolous, but the appellate court reversed and remanded. *People v. White*, 504 N.E.2d 520 (Ill. App. Ct. 1987).

On remand, represented by counsel, White raised three additional issues: the State's failure to disclose exculpatory evidence; the systematic exclusion of blacks from the grand and petit juries; and ineffective assistance of trial counsel based on counsel's alleged abuse of alcohol throughout trial. The circuit court dismissed the petition on its merits without holding an evidentiary hearing. White appealed the dismissal with regard to the grand jury claim and the claims of ineffective assistance of counsel based on failure to consult, failure to call Bernice Caldwell as a witness, use of alcohol, and failure to advise him of his right to testify. The appellate court affirmed the dismissal. *People v. White*, 536 N.E.2d 481 (Ill. App. Ct. 1989).

White filed a petition for leave to appeal to the Illinois Supreme Court, challenging the appellate court's rulings as to the grand jury claim, the ineffective assistance of counsel claim based on failure to consult, and an ineffective assistance claim based on the failure to object to the alleged exclusion of black jurors. The Illinois Supreme

Court denied leave to appeal. *People v. White*, 545 N.E.2d 128 (Ill. 1989).

In early 1994, White filed a petition for a writ of habeas corpus in the federal district court for the Northern District of Illinois. That court transferred the petition to the Central District of Illinois, which court construed the petition to raise five claims: 1) the grand jury indictment violated due process because it was based upon perjured testimony; 2) trial counsel provided ineffective assistance by failing to challenge the grand jury perjury, failing to consult with defendant prior to trial, appearing at trial smelling of alcohol, failing to call Bernice Caldwell to testify, and failing to explain to White his constitutional right to testify in his own defense; 3) denial of the right to testify; 4) inadequacy of the State's fact-finding procedures and unfairness of the waiver doctrine asserted by the State; and 5) withholding of information by the State concerning the perjured grand jury testimony. White later amended the petition to include a challenge to the disproportionate severity of his life sentence compared to the forty-year sentence of Bernice Caldwell.

The district court denied White's petition on July 31, 1996 without holding an evidentiary hearing. The court held that trial counsel's alleged failure to consult and his failure to call Bernice Caldwell[1] did not deny White his right to effective assistance of counsel, and that White's claim of perjury did not undermine the indictment. The court found that all of the other arguments raised in the petition had been procedurally defaulted because White did

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[1] It is unclear why the district court did not find the claim regarding trial counsel's failure to call Bernice Caldwell as a witness to be procedurally defaulted, given its view that failure to include an issue in the petition for leave to appeal constituted a procedural default. In any event, this Court's reversal on the procedural default question means that White was entitled to an adjudication on the merits, and so we will review the district court's substantive resolution of the issue in Part III below.

not include them in his petition for leave to appeal to the Illinois Supreme Court during the post-conviction phase of his case.

White asked the district court for a certificate of probable cause to appeal; the court construed the request as being for a certificate of appealability (the newer terminology of the habeas statute, see 28 U.S.C. § 2253(c)), and then denied the request. This Court, however, granted White a certificate of appealability on March 10, 1997 with respect to the ineffective assistance of counsel claims and the district court's application of procedural default principles. For the reasons given below, this Court holds that it was error to find White's claims procedurally defaulted for failure to include them in his petition for leave to appeal to the Illinois Supreme Court. We further hold that the district court erred in dismissing White's other ineffective assistance of counsel claims without a determination as to the duration and substance of the consultation between White and his counsel prior to trial. We therefore vacate the district court's order and remand for consideration of the erroneously defaulted claims and the taking of evidence concerning trial counsel's allegedly ineffective performance.

I. STANDARD OF REVIEW

White filed his petition for habeas corpus on February 2, 1994, which was before the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act (AEDPA). This Court therefore applies the version of the habeas statute that was in effect prior to the AEDPA. See *Lindh v. Murphy*, 117 S. Ct. 2059. Under that earlier version of the statute, we review conclusions of law reached by the district court and the state courts *de novo*, but apply a deferential standard to the state courts' findings of fact, viewing them as "presumptively correct." *Lieberman v. Washington*, 128 F.3d 1085, 1091 (7th Cir. 1997).

II. PROCEDURAL DEFAULT

The district court denied White habeas relief on his ineffective assistance claims concerning trial counsel's use of alcohol and failure to advise White of his right to testify on the ground that White had not included these issues in his petition for leave to appeal (PLA) to the Illinois Supreme Court during the post-conviction phase of the case.[2] This Court's recent decision in *Boerckel v. O'Sullivan*, 135 F.3d 1194 (7th Cir. 1998), reaffirmed and elaborated upon the holding of *Gomez v. Acevedo*, 106 F.3d 192 (7th Cir. 1997), vacated on other grounds, 118 S. Ct. 37, that the failure to include a claim in the discretionary PLA to the Illinois Supreme Court does not constitute a default of that claim. Although *Boerckel* addressed the question with an eye toward whether the failure to include a claim in the PLA constituted a failure to exhaust available state remedies, the opinion correctly noted that in this context the result is identical under either exhaustion principles or procedural default doctrine. See *Boerckel*, 135 F.3d at 1199. *Gomez*, moreover, concluded that a habeas peti-

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[2] White also argues that the district court erroneously found his disparate sentencing claim to be procedurally defaulted, but he declines to argue the merits of the issue in light of recent decisions by the Supreme Court and this Court. Given this stance, we will not address the district court's procedural default ruling on this issue. We note, however, that the posture of this claim is different from that of the claims we do address: the disparate sentencing argument apparently was raised in the Illinois Appellate Court on direct appeal but was not advanced at all during the post-conviction challenge. For the sake of thoroughness, we note that White has not argued on appeal that the district court erred in dismissing on procedural default grounds his claims of denial of the right to testify in his own defense (which the lower court thought was subsumed within the ineffective assistance of counsel claim), the inadequacy of the State's fact-finding procedures and unfairness of the waiver doctrine, or the withholding of information concerning the allegedly perjured grand jury testimony. These issues are therefore waived, and this Court will not consider them.

tioner's failure to raise a claim in a PLA to the Illinois Supreme Court on direct appeal did not give rise to a procedural default of that claim. *Gomez*, 106 F.3d at 196. If the failure on direct appeal does not have that effect, then certainly a similar failure at the post-conviction stage cannot. In light of these decisions, the district court erred in holding White's ineffective assistance claims that were raised on post-conviction appeal before the Illinois Appellate Court but not included in the PLA to the Illinois Supreme Court procedurally defaulted. On remand, therefore, the district court must evaluate those claims on their merits.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

The district court considered and rejected the merits of White's claims of ineffective assistance of counsel based on trial counsel's failure to call Bernice Caldwell to testify and failure to consult with White for any significant length of time prior to trial. The court's evaluation of the claims was brief, consisting mainly of the observations that "the Seventh Circuit has never upheld an ineffective assistance claim based on a trial attorney's failure to call certain witnesses" and that "[a] federal habeas court cannot say that Mr. White's trial counsel had to meet with Mr. White for any certain duration of time" (July 31, 1996 Order at 4). The court also noted that, whereas White claimed that counsel met with him for no more than twenty minutes before trial, the Illinois Appellate Court found that counsel met with White for forty-five minutes (*Id.*).

The framework for evaluating claims of ineffective assistance of counsel is well established. The criminal defendant seeking to prevail on such a claim must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687. More particularly, the first inquiry requires a court to "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assist-

ance." *Id.* at 690. Then, assuming that counsel's performance is found to have been deficient, the court must inquire whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

A. Competence

Merely stating the approach indicates that the district court on remand will have to reconsider its conclusions regarding these two claims of ineffective assistance. The court is required to evaluate such claims in light of "all the circumstances," and our decision makes relevant a set of circumstances that the district court did not fully consider the first time around: the claims that were improperly procedurally defaulted. Instead of viewing the alleged failure to consult and the failure to call Bernice Caldwell in isolation, the court must view them on remand in light of the additional claims regarding alcohol abuse and failure to advise White concerning his right to testify in his own defense.

The district court's resolution of the failure to consult claim was inadequate for another reason as well. The court, as noted, refused to "say that Mr. White's trial counsel had to meet with Mr. White for any certain duration of time." Although this stance is certainly correct in the abstract, it would not be correct to say that brief, desultory consultation can never amount to constitutionally ineffective assistance. In one case, a lawyer might consult only briefly with her client, yet spend significant additional time reviewing records and interviewing other potential witnesses. Such representation, without other evidence of ineffectiveness, would very likely be sufficient under the standard announced in *Strickland*. Yet if the same lawyer in another case put little or no further effort into the defense beyond her cursory consultation with the client (and that course of action prejudiced the defense), the representation might very well be inadequate.

White makes out a plausible case that his own situation is more akin to the latter example than to the former. First, it is true that the Illinois Appellate Court found that White's trial attorney met with him for a total of forty-five minutes prior to trial. See *People v. White*, 536 N.E.2d 481, 486 (Ill. App. Ct. 1989). Federal courts engaged in habeas corpus review presume that state court factual findings are correct. See 28 U.S.C. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 547; *Mills v. Jordan*, 979 F.2d 1273, 1279 (7th Cir. 1992). That presumption, however, does not mean that such factual findings are impervious to question. The Illinois Appellate Court arrived at the forty-five minute figure by examining prison visitor records to determine the interval between the time White's attorney signed in as a visitor and the time he signed out again. One visit showed a thirty minute lapse, and another revealed a period of fifteen minutes. White quite sensibly points out that the time between signing in and signing out is most likely greater than the time counsel actually spent in consultation with White, given that some time undoubtedly elapsed between the time counsel signed in and the moment he and his client were actually in a room together. The difference may be small, and this Court has no way of knowing at this time whether the forty-five minute estimate is off by a little or by a lot. That question is one (as we shall see, one of several) that could have been resolved had the district court given White the opportunity, via an evidentiary hearing or otherwise, to supplement the record concerning exactly what consultation actually took place.

Whether the actual amount of time White and his lawyer spent together preparing for the case was closer to forty-five minutes or twenty, the brevity of the period raises questions about its adequacy. This was, after all, a case involving charges of murder, armed robbery, and conspiracy. While it did not have the most complex set of facts one could imagine, neither was it the simplest case on the books. Even if the consultation amounted to only twenty

minutes it is not, as White argues, ineffective assistance of counsel *per se*. But it is sufficient to lead a reviewing court to inquire further.

In this regard, White does not rest upon the claim that his counsel's very brief consultation was, without more, ineffective assistance. Rather, he points to several concrete results that followed from the cursory consultation. First, he argues that counsel's failure to call Bernice Caldwell as a witness must have been based on a poor understanding of the case caused by the inadequate consultation. Second, one of the claims that the district court incorrectly found to be procedurally defaulted is also arguably a result of the lack of sufficient consultation: counsel's failure to advise White of his constitutional right to testify in his own defense or to appreciate himself the possible value that such testimony might provide to the defense.

Viewed in this manner, the claimed failure to consult bears resemblance to a failure to investigate, which can undoubtedly be enough in some instances to constitute ineffective assistance of counsel. See, *e.g.*, *Hall v. Washington*, 106 F.3d 742, 752-753 (7th Cir. 1997); *Kubat v. Thieret*, 867 F.2d 351, 370 (7th Cir. 1989), certiorari denied, 493 U.S. 874. If counsel's failure to consult adequately with his client led to his failure to comprehend the evidence in the case, then the further missteps White alleges are almost necessarily not attributable to sound strategic decisions. Moreover, another of the claims improperly found to have been procedurally defaulted—that counsel was abusing alcohol during the trial—may be intertwined as well, in that it might have contributed to the failure to make time to consult, the failure to advise White of his right to testify, and the misunderstanding of Caldwell's and White's potential testimony.

In any event, this Court does not hold today that White's trial counsel was constitutionally ineffective. We hold merely that the district court erred in rejecting the claim out of hand, without inquiring further into exactly what

preparation counsel conducted and for how long. The state courts resolved the ineffective assistance claims on prejudice grounds and so did not conduct evidentiary hearings into the length and substance of the consultations. This Court has held that "a federal evidentiary hearing is required if a habeas petitioner alleges facts which, if proved, would entitle him to relief and the state courts—for reasons beyond the control of the petitioner—never considered the claim in a full and fair hearing." *Porter v. Gramley*, 112 F.3d 1308, 1317 (7th Cir. 1997). A district court may, however, devise a course of action short of a full-blown hearing if such a course will be adequate to discover the necessary facts. See *Wright v. Gramley*, 125 F.3d 1038, 1044 (7th Cir. 1997).

The government makes much of the fact that White did not submit an affidavit from his trial attorney in support of his petition for habeas relief. The record does not indicate whether that absence was due to White's lack of diligence, to trial counsel's unwillingness to give an affidavit, or to some other cause. On remand, the district court will be able to use appropriate measures to secure the affidavit or testimony of trial counsel in order to determine whether his representation was ineffective.

At the risk of being repetitive, the district court on remand must not view each claim of ineffective assistance in isolation, but rather must examine trial counsel's performance as a whole to determine whether it fell below the measure of constitutional effectiveness. See *Strickland*, 466 U.S. at 690 (requiring court to examine whether counsel was ineffective "under all the circumstances"). Thus the court must consider the failure to consult claim along with the other claims—of alcohol abuse during trial, of the failure to advise White of his right to testify, and of the failure to call Bernice Caldwell as a witness. The central question on remand will be whether all of these alleged errors together add up to ineffective assistance.

B. Prejudice

All of the foregoing discussion would be unnecessary if White could not show that he was prejudiced by the alleged ineffective assistance of counsel. See *id.* at 687. If there is not a "reasonable probability" that the outcome of the trial would have been different absent counsel's substandard performance, White could not prevail on his habeas claims. See *id.* at 694. But White has made a showing of prejudice that is sufficient, assuming for the moment that his counsel's performance was in fact below the standard of effectiveness, to sustain his claim and require a new trial.

At trial, White's attorney sought to convince the jury that White's brother, Michael, had hired Johnson and Walker to kill Jackson. The strategy was not without basis, because Johnson's initial statements to the police implicated Michael White rather than Jerome. But the gambit was severely undermined by the testimony of Lennice Caldwell's daughter, Theresa. Defense counsel's theory of the case depended heavily on the idea that only four adults were present in Caldwell's house on the night of the shooting: Caldwell, Johnson, Walker, and Michael White. Theresa testified, however, that she saw only Caldwell, Jerome White, and two other men in the house that night. This testimony, coming as it did from a witness who was presumably without motive to lie, was devastating to the trial strategy.

According to Caldwell's affidavit and the actual testimony of both Caldwell and Jerome White at Caldwell's trial, they were in fact at Caldwell's house with Johnson and Walker on the night of the murder. But Caldwell and White claim that they went to bed shortly after arriving at the house in Champaign, then awoke the next morning to find the guns and the rental car gone. Thus their proffered testimony presents a theory of the case that would exonerate them without contradicting the testimony of the child, Theresa.

The jury might well have chosen not to believe this alternative story, just as it apparently disbelieved the defense based on the claim that Michael White ordered the murder. But there is at least a reasonable probability that the jury would have seen matters differently if Caldwell, White, or both of them had testified to their version of events. Instead of being given a choice between two statements by the killer himself, only one of which was consistent with Theresa Caldwell's testimony, the jury would have been given a choice between Johnson's story and a second, equally plausible story told by Caldwell and White. Theresa Caldwell's testimony no longer would have been fatal to the defense, because it would have been entirely consistent with the theory that Johnson and Walker stole the guns and the car after Caldwell and White went to bed.

If on remand the district court determines that trial counsel's performance was deficient, the showing of prejudice is sufficient to require that the petition for a writ of habeas corpus be granted. This Court vacates the order of the district court denying White's petition and remands the case so that the district court may gather evidence concerning the length and substance of trial counsel's consultation with his client, then consider that consultation along with the other claims of ineffective assistance of counsel.

VACATED AND REMANDED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 22, 1998

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

JEROME WHITE,

Petitioner-Appellant,

No. 96-3187 *vs.*

SALVADOR A. GODINEZ,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 94 C 2055—**Harold A. Baker**, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by respondent-appellee on June 11, 1998, all of the judges on the panel have voted to deny rehearing and no judge in active service has requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.